Brannan Sand and Gravel Company and International Brotherhood of Teamsters, Local 13, AFL-CIO. Cases 27-CA-12223 and 27-CA-12223-2

July 11, 1994

# **DECISION AND ORDER**

# By Members Stephens, Devaney, and Browning

On October 26, 1993, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

In adopting the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in its health care plan, we distinguish Stone Container Corp., supra, which issued after the judge's decision. In Stone Container, the employer notified the union in March during negotiations for a collective-bargaining agreement that it could not afford to give employees the annual April wage increase. The Board found that the employer made its proposal in time to allow for bargaining over the matter, but the union made no counterproposal concerning the April wage increase and did not raise the issue again during negotiations. The Board concluded that the employer satisfied its bargaining obligation regarding the April wage increase and was not required to refrain from implementing the change until an overall impasse had been reached on bargaining for a collective-bargaining agreement as a whole. The Board reasoned that the annual April wage review was a discrete event that just simply happened to occur while contract negotiations were in progress.

The health plan changes at issue here are similar to the annual wage increase involved in *Stone Container* because the record shows that since the inception of the health care plan, its costs and benefits have been reviewed and adjusted annually to control the Respondent's expenditures. Therefore, in accordance with *Stone Container*, we find, contrary to the judge, that the Respondent was not obligated to refrain from implementing its proposed changes until an impasse was reached on collective-bargaining negotiations as a whole.

However, unlike the situation in Stone Container, we find here that the Respondent did not satisfy its obligation to provide the Union with timely notice and a meaningful opportunity to bargain over the change in employment conditions. Rather, the record shows that the Respondent presented the health plan changes to the Union as a fait accompli. In this connection, we rely on the fact that by the time the Union was apprised of the contemplated changes, the Respondent had already announced them to the employees. Further, the Respondent's own witness testified that the Union was advised that any discussion over the health plan changes would have been "fruitless" because the Respondent had no intention of doing anything other than what it planned to do. Accordingly, for these reasons, we agree with the judge that the Union did not waive its right to bargain and that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the health plan changes. See Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

## **ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brannan Sand and Gravel Company, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Barbara E. Greene, Esq., for the General Counsel.
S. Lorrie Ray, Esq., Mountain States Employers' Council, Inc., of Denver, Colorado, for the Respondent.
Frank L. Frauenfeld, Teamsters Joint Council No. 3, of Denver, Colorado, for the Charging Party.

#### DECISION

#### STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Here the General Counsel of the National Labor Relations Board (NLRB or the Board) alleges that Brannan Sand and Gravel Company (Respondent or the Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by: (1) unilaterally changing the terms of its health insurance plan applicable to employees represented by the International Brotherhood of Teamsters, Local 13, AFL–CIO (the Union)<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> In agreeing that the Respondent violated Sec. 8(a)(5) by bypassing the Union and dealing directly with unit employees, we find it unnecessary to rely on the judge's discussion of *E. I. du Pont & Co.*, 311 NLRB 893 (1993). Instead, we find sufficient evidence of direct dealing in the survey and discussion of employees' compensation, taken overall, to find that the Respondent bargained in bad faith under Sec. 8(a)(5) and (1).

<sup>&</sup>lt;sup>2</sup> Without passing on whether *Stone Container Corp.*, 313 NLRB 336 (1993), was correctly decided, Member Browning concurs with the result reached by her colleagues, because she agrees that the Respondent did not provide the Union with timely notice and a meaningful opportunity to bargain before implementing changes in health benefits.

<sup>&</sup>lt;sup>1</sup>The name of the Union has been changed to reflect its new name.

on or about April 1, 1992;<sup>2</sup> and (2) bypassing the Union and dealing directly with its represented employees concerning its health insurance plan, and other wages and working conditions since on or about March 17.

The Union filed Case 27–CA–12223 on May 28; it filed the second case on June 4. On July 9, the Regional Director for NLRB Region 27, acting on behalf of the General Counsel, issued a consolidated complaint and notice of hearing (complaint).<sup>3</sup> Respondent timely answered the complaint on July 23 denying that it engaged in the unfair labor practices alleged. Thereafter, the scheduled hearing was postponed indefinitely pending consideration of another charge. On March 4, 1993, these cases were rescheduled for hearing.

I heard these cases on July 13 and 14, 1993, at Denver, Colorado. Having now carefully considered the record, the demeanor of the witnesses while testifying, and the parties' posthearing briefs, I conclude that Respondent violated the Act based on the following

## FINDINGS OF FACT

#### I. BACKGROUND

Respondent, a corporation with an office and place of business in Denver, Colorado, is engaged in the asphalt paving and sand and gravel business.<sup>4</sup> Its operations are seasonal lasting generally from about the beginning of April to about mid-December. During this seasonal period, Respondent employs about 210 employees.

Among other benefits, Respondent's employees can elect coverage under its health, dental, and vision care program. This program is a self-insured, contributory plan administered by Consolidated Administrators, Inc. (CAI). Since its inception, the program costs and benefits have been reviewed and adjusted annually to control the Company's health benefit expenditures.

On November 15, 1990, the Union was certified as the bargaining representative for Respondent's drivers, oilers, and tiremen, about 60 employees in all. Thereafter, eight bargaining sessions were held throughout the 1991 calendar year in an unsuccessful effort to conclude a collective-bargaining agreement. At several of these sessions the parties' negotiators discussed the health benefits applicable to the unit employees and the Union's proposal to supplant the existing health benefits with a plan administered by the Teamsters benefit trust. The company negotiators repeatedly and adamantly rejected the Union's health plan proposal.

As detailed below, 1992 bargaining sessions were held on January 13 and April 16. Thereafter, there was a hiatus in negotiations until the 1993 calendar year when additional bargaining sessions were held. During this hiatus, Respondent filed a representation petition claiming that it had objective to the property of the property of

tive considerations to establish a good-faith doubt of the Union's majority status. The Board dismissed that petition on September 22 based on the outstanding complaint in these cases. *Brannan Sand & Gravel*, 308 NLRB 922 (1992).

For some time prior to 1992, Respondent's office, administrative and managerial employees held team meetings for the purpose of discussing office problems and formulating solutions. Until 1992, none of Respondent's construction employees participated in the team meetings.

The central questions posed by this case arise from the changes made in Respondent's health plan in 1992, and the claims made that Respondent bypassed the Union and dealt directly with its employees in connection with the 1992 health plan changes and the implementation of the team meeting program involving the unit employees.

## II. RELEVANT FACTS

## A. Matters Pertaining to the Pleadings

Appended to the General Counsel's posthearing brief is a motion to amend the complaint to allege that Respondent unlawfully bypassed the Union in January 1992 by surveying unit employees concerning health insurance. The General Counsel argues that the amendment is closely related to other allegations of the complaint dealing with bypassing the Union and that the matter was fully litigated at the hearing.

Respondent opposes the motion on the ground that the subject matter of the proposed amendment is not closely related to other complaint allegations and was not fully litigated. For these reasons, Respondent claims that the amendment is barred by Section 10(b).

In view of the other bypassing allegations in the complaint, I find this added matter concerning the January survey to be closely related and, hence, not barred by Section 10(b). Additionally, I find the matter was fully litigated at the hearing. Indeed, Respondent's simultaneously filed posthearing brief, contains a separate section arguing that the survey at issue "was not in derogation of the Act." Accordingly, the amendment is allowed.

Paragraph 7 of the complaint alleges that the Union has been the 9(a) representative of the unit employees at all times since its certification in November 1990. The essence of this allegation is that the Union has been designated or selected for collective-bargaining purposes by a majority of the unit employees.

In its answer, Respondent admits paragraph 7 but alleged that it has a good-faith doubt of the Union's majority status. No evidence was offered at the hearing in support of its good-faith doubt claim. Accordingly, I find the Union was the majority representative at all material times.

# B. The 1992 Health Plan Changes

By a letter dated December 1, 1991, a CAI representative provided Respondent with a compilation of the anticipated health plan costs for the 1991 calendar year and projected costs for the 1992 calendar year, including comparative costs of selected alternative health plans. A month later the same representative wrote to the Company outlining a variety of proposals designed to minimize increased health plan costs anticipated for 1992.

On January 13, the parties met for a previously scheduled bargaining session. Near the end of the meeting, Kermit

 $<sup>^2\,\</sup>mathrm{All}$  dates are in the 1992 calendar year unless otherwise indicated.

<sup>&</sup>lt;sup>3</sup>At the hearing, the General Counsel amended the complaint to expand and clarify the agency allegations. In her brief, counsel for the General Counsel moved to amend the complaint further. Respondent opposes that motion. The General Counsel's pending motion to amend the complaint is addressed below.

<sup>&</sup>lt;sup>4</sup>Respondent's direct inflow annually exceeds the dollar volume established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, the exercise of the Board's jurisdiction here is appropriate.

Darkey, the Company's principal negotiator, told Jack Parker, the Union's chief negotiator, that the Company was studying changes in its health plan. Darkey told Parker that several changes were being considered including increasing the deductibles, copayments, and the amount of the employees' contributions. Parker inquired about the cost of the plan and Curt Marvel, Respondent's vice president and general manager who attended all the sessions, responded that it was about one-half million dollars a year. The discussion then ended and arrangements were made for another meeting on April 9.5

Later that month, the CAI representative mailed a survey to a representative sample of the Company's employees—including some unit employees—asking, essentially, if they would be interested in a "managed care" health plan. An accompanying memorandum from Marvel explained the purpose of the survey and asked employees to return the completed survey form to their supervisor or Chris Nast, one of the Company's managers. The Union was never told about the survey.

About 60 employees, including 19 unit employees, responded to the survey. Based on the survey, company officials determined that a managed care plan was unpopular so that alternative was dropped from consideration. Thereafter, Nast and a CAI agent worked out the details of the adjustments in the existing plan which Marvel eventually approved.<sup>6</sup>

In a March 1 memorandum, Marvel notified the Company's health plan participants that, effective April 1, "there will be changes to your [health] benefits." Marvel went on to explain a variety of adjustments to the existing health plan benefits, and several changes in the required deductible payments, copayments, and employee contributions. He also announced meetings on March 17 and 19 to explain the plan, and alluded to the fact that the "managed care" concept had been dropped following the "mixed response to our survey." A copy of Marvel's March 1 memo was faxed to the Union on March 6.7 The Union did not respond to Marvel's March 1 memo until the April 16 bargaining session.8

The Company implemented the announced changes on April 1 after holding the meetings with employees (including the unit employees) on March 17 and 19 to explain the forthcoming changes referred to in the March 1 memo.

At the previously scheduled bargaining session on April 16, Parker told Darkey that he had learned "from some of the employees" that there had been changes made in the health in surance plan and asked why the Company had not negotiated with the Union concerning the changes. John Henderson, a Mountain States Employers' Council staff member who took notes at all the bargaining sessions to that point, testified that Darkey (who did not testify) told Parker, in effect, that the March 6 facsimile was intended to inform the Union about the planned changes and that the Company would have discussed the changes with the Union if Parker had responded before April 1. According to Henderson, Darkey added in a parenthetical manner that such a discussion would have been "fruitless." Henderson explained that Darkey's "fruitless" remark alluded to the fact that the parties had disagreed throughout negotiations over establishing separate benefits for unit employees.

Parker's account is not appreciably different. He explained that he anticipated the health plan changes would be discussed at the April 16 bargaining session. When he learned at that session that the changes had already been implemented, Parker questioned whether the Company was bargaining in good faith. In response, Darkey told Parker that 'he [Darkey] could have called a meeting to discuss it, but . . . the answer would still be the same' because the Company was unwilling 'to change the entire plan for a group of 50 to 60 truck drivers so . . . they would have insisted on making the changes.'

Union Business Agent Chuck Connor attended the April 16 bargaining session and provided a similar account about the exchange between the negotiators that day. He testified that Parker asked Darkey if the health plan changes had been implemented and that Darkey responded affirmatively. By Connor's account, Marvel then outlined the changes and, after Marvel finished, Parker asked why the changes had not been negotiated. Darkey, Connor said, replied, "[I]t really didn't make any difference because they were going to do it anyway."

# C. The New Teams

Early in 1992, three project managers, with Marvel's approval, devised a plan to expand the team concept beyond the office and administrative staff. Five new teams consisting of 10 or 11 individuals, each chaired by a foreman or supervisor, were established. At least two of the teams included unit employees.

The managers overseeing the operation of the team program prepared a two-page memorandum in March which set forth the goals and strategies of the Company's teamwork concept. The announced goals for the new teams included: (1) promoting better employee relations; (2) establishing an employee feedback and suggestion mechanism; and (3) getting employees involved in all aspects of the Company.

On March 30, Marvel faxed a 10-page packet of materials to Parker concerning the team program including a cover sheet reflecting that the topic for the first team meeting "was salary increases." In fact, the first meeting of the teams occurred on March 26.

Kenneth Mefford, a former company driver, attended the March 26 meeting of the team to which he was assigned. When he arrived for the meeting, Mefford was provided with a packet of written materials which included the team ap-

<sup>&</sup>lt;sup>5</sup>At some subsequent time, this meeting was postponed for a week

<sup>&</sup>lt;sup>6</sup> Marvel said that he approved the changes in late March. Based on other evidence, it is reasonable to presume that the late March approval was pro forma.

<sup>&</sup>lt;sup>7</sup>Parker admits that he received notice of the changes but was uncertain as to when the notice was received. Melissa Nankervis, an administrative assistant at the Company, testified about faxing a copy of the March 1 notice to employees to Parker on March 6. To the extent that the General Counsel continues to assert doubt that this notice was provided to the Union on or about March 6, that assertion is rejected.

<sup>&</sup>lt;sup>8</sup> The implication in most of Parker's testimony is that he did not respond to the facsimile but, nonetheless, he did testify that he sent a letter to the Company in response. Despite its critical significance, no such letter was ever produced nor was testimony elicited concerning its substance. Accordingly, I discount any claim that he responded to the notice he received on March 6 concerning the planned changes in the health benefits program prior to the April 16 bargaining session.

pointments, the agenda for the first team meeting, and two other documents concerning the Company's wage committee and its merit pay scale.

The agenda, distributed at the March 26 session, set forth the team meeting ground rules. It states that the general purpose of the hour-long team meetings was "to promote a feeling of cooperation and to build a spirit of winning performance" by meeting "the first and third Thursday of each month to discuss a specific topic and . . . come up with ideas that might streamline or improve overall company performance in that area." Supervisors' meetings were to be held on the second and fourth Thursday of the month "to discuss and implement solutions developed in the prior [team] meetings." Agenda topics not fully exhausted at one meeting could be continued to the next meeting. Attendance at team meetings, the agenda document states, was "voluntary, with no payment for your time."

The specific discussion topic planned for the first team meetings was detailed as follows in the agenda document:

Problem—How should field (hourly) [e]mployees be evaluated and rewarded with salary increases. This topic was chosen as a direct result of comment made on the recent employee surveys.

- A. Should employees be evaluated based on performance?
  - B. If so, who should evaluate, when, based on what?
  - C. What should be the format be for evaluations?
  - D. How many evaluations per year and when?
- E. Are there any other criteria which raise[s] should be based on? If so, what are they?

Supervisor Bill Langen chaired the March 26 team meeting attended by Mefford. Mefford testified that Langen only briefly alluded to the performance evaluation system referred to in the agenda but "[n]obody discussed it." This cursory reference gave Mefford the impression that "[t]hey basically already had their minds made up on that." The bulk of the first meeting, according to Mefford, was spent on a discussion about adding another person to each of the paving crews and getting the asphalt out faster.

Mefford attended the next scheduled team meeting but he had little recollection of the matters discussed. He then quit attending the meetings until June when the policy about pay for time in attendance at the meetings was changed. Mefford recalled that at one of the later meetings he attended, he suggested that the drivers' safety program could be improved. Langen, Mefford testified, agreed to discuss the implementation of regular driver safety meetings with the drivers' supervisor.

According to Marvel, interest in the team meeting program "fizzled out" by August so they were discontinued entirely.

# III. FURTHER FINDINGS AND CONCLUSIONS

# A. The 1992 Health Plan Changes

The General Counsel argues that the March 6 notification to the Union concerning the health plan changes was not designed to provide the Union with an opportunity for meaningful bargaining but rather was notice to the Union of a fait accompli. This conclusion, the General Counsel asserts, was

reinforced by Darkey's comments to Parker at the April 16 session.

Respondent contends that the 1992 health plan changes were minor and that it satisfied its bargaining obligation by the March 6 notice to the Union. The Union's failure to request bargaining over the course of the next 3 weeks prior to the April 1 implementation date, the Respondent argues, amounts to a waiver of the Union's right to bargain about the proposed health plan changes. In this respect, Respondent asserts that the bargaining-to-impasse rule discussed below is inapposite to "matters outside the purview of the ongoing negotiations" such as minor or annual changes in its operations-like annual wage increases, changes in employee uniforms, and annual minor changes to the insurance plan. In support of this proposition, Respondent relies on *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (5th Cir. 1992).

Section 8(a)(5) obliges an employer to "bargain collectively with the representatives of his employees." Section 8(d) defines that obligation to include "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

In general, if its employees are represented by a labor organization, an employer may not change any employment term which falls within the statutory penumbra of "wages, hours and other terms and conditions of employment" without providing the employee representative with prior notice of a proposed change and an opportunity to bargain concerning it. *NLRB v. Katz*, 369 U.S. 736 (1961). If the parties are not engaged in the process of negotiating a complete collective-bargaining agreement, the unilateral implementation of a proposed change may be lawful if the employer provides the employee representative notice of the change under consideration and the representative fails to make a timely request for bargaining. *Associated Milk Producers*, 300 NLRB 561 (1990).

On the other hand, where the parties are engaged in negotiations for a collective-bargaining agreement involving bargaining over numerous proposals, no need exists for the employee representative to request additional bargaining as a waiver will be found in that setting only if the employee representative manifests an expressed intent to consciously relinquish its right to bargain about the subject at issue. *Intermountain Rural Electric*, 305 NLRB 736 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993). Absent such a manifestation, an employer "must not only give notice and an opportunity to bargain, but also must refrain from implementation unless and until impasse is reached on negotiations as a whole." Id.

Here I cannot agree with Respondent's characterization that the 1992 health plan changes were incidental to the ongoing negotiations. Both sides had previously presented proposals on the subject along with numerous other proposals. The Union was vigorously seeking to substitute it own health plan for unit employees on the ground that its plan cost less. Respondent resisted splitting off the unit employees from its existing health plan because of the adverse cost effects on the existing health plan for its unrepresented employees. The Union countered this argument by offering to arrange coverage under its plan for all Respondent's employees but Respondent declined to consider that alternative. Moreover, the

1992 changes here were hardly minor as nearly every health plan benefit was affected and employee contributions increased substantially. Contrary to Respondent's contention, I find that issues pertaining to health coverage for unit employees as well as the cost of that coverage were among the significant issues on the bargaining table at the time.

Notwithstanding, Respondent implemented its 1992 health plan changes at a time when negotiations for a complete collective-bargaining agreement were in progress and when no impasse in those negotiations had occurred. Respondent does not contend that the Union expressly waived its right to bargain concerning these changes and the exchange at the April 16 meeting precludes any such finding. Instead, Respondent contends, in effect, that a waiver should be inferred from the Union's failure to timely request negotiations or otherwise respond to the March 6 notice prior to the April 1 implementation date established in that notice.

In my judgment, Respondent unlawfully implemented the complex 1992 health plan changes based on a misapprehension that it was entitled to do so because the Union failed to respond by the April 1 implementation deadline which was set forth in the notice sent to the Union on March 6. In the circumstances here, Respondent did not satisfy its bargaining obligation merely by providing notice of the proposed changes.

As noted above, the Union was under no obligation to request "additional" bargaining and the Respondent was not privileged to implement the changes with respect to the unit employees absent an impasse in negotiations or an express waiver from the Union. For its part, the Union was entitled to treat the March 6 notice from Respondent as another proposal to be considered together with all pending proposals. In these circumstances, the waiver defense implied from the Union's conduct, or lack thereof, is not available to Respondent. Instead, the Union "had a right to play an active role in determining whether such changes were desirable during negotiations or whether they should have been bargained for in exchange for other benefits." M. A. Harrison Mfg. Co., 253 NLRB 675 (1980).

Respondent's reliance on the *Pinkston-Hollar* case and other similar cases is misplaced. As the Fifth Circuit made clear in *Pinkston-Hollar*, it applied a narrow exception to the "bargain-to-impasse" rule applicable to situations where the employee representative engages in dilatory and evasive bargaining tactics to the peculiar facts of that case. Here, the only evidence of delay on the Union's part is that it chose to wait until the next regularly scheduled bargaining session to address the health plan changes. Applying this exception in these circumstances would be highly irrational and would serve to eviscerate the usual rule entirely especially where, as here, Respondent concedes that the changes in its self-funded plan can be made when ever it chooses to do so.

Moreover, the Union cannot be held to have waived bargaining over a change that is presented as a fait accompli. *Gulf State Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983). The objective evidence here supports the General Counsel's contention that the notice to the Union concerning the 1992 health plan changes was a mere announcement of a fait accompli. Thus, by the time the Union was apprised of the contemplated changes, Respondent had already notified employees that the changes would be effective April 1 and it scheduled employee meetings to explain what changes

would take place. This evidence indicates an intent to make the changes without bargaining with the Union. *S & I Transportation*, 311 NLRB 1388 (1993). Only Respondent's self-serving assertions that it would have been willing to meet and bargain with the Union had it responded to the March 6 notice counter the evidence that Respondent was on a predetermined course of unilateral action and even those assertions are greatly diminished by Darkey's statement at the April 16 bargaining session.

Accordingly, as Respondent implemented the 1992 health plan during the course of negotiations for a complete collective-bargaining agreement which had not reached an impasse and without the Union's express agreement or waiver, I find Respondent violated Section 8(a)(1) and (5) as alleged.

# B. Bypassing the Certified Representative

The General Counsel contends that Respondent also violated the Act when it bypassed the Union and dealt directly with employees in order to survey employees about their health care preferences in January, announced changes in the health care plan in mid-March, and treated with bargainable subjects at the team meetings.

Respondent contends that no unlawful "dealing with" employees occurred on any of these occasions. In this regard, Respondent contends that the January survey was designed merely to elicit information from employees, that the mid-March meetings about the health care changes served only to provide information to employees, and that no evidence shows changes in wages, hours, or working conditions resulted from the 1992 team meetings involving the unit employees. In addition, Respondent contends the team meeting issue is moot because the meetings have ceased.

Viewed in isolation, some of these incidents appear not to be serious. However, when viewed together and when consideration is given to the limited period over which these events occurred and the background of the negotiations for an initial collective-bargaining agreement, I find that the direct dealing complained of is of consequence.

As noted above, the survey was conducted at or near the time Respondent announced at the January bargaining session that it was considering changes in its health plan. No disclosures were made at the time concerning Respondent's desire for input from the unit employees. Similarly, the mid-March meetings to advise employees about the upcoming changes in the health plan, although conducted after notice was given to the Union, could reasonably lead unit employees present to conclude that Respondent intended to take such action—as it ultimately did—without negotiating the changes with their representative. Within another 2 weeks thereafter the first of the team meetings was held with no prior notice to the Union and with the announced agenda of obtaining employee input concerning Respondent's pay evaluation system, clearly a bargainable subject.

I cannot agree with Respondent that at least some of this conduct does not fit within the parameters of "dealing with" as articulated by the Board in E. I. du Pont & Co., 311

<sup>&</sup>lt;sup>9</sup>Although unit employee Mefford testified that the planned discussion concerning the pay system did not take place at the meeting he attended, he did acknowledge receipt of the agenda document outlining the planned discussion. Whether that agenda was followed in other team meetings is unknown.

NLRB 893 (1993). The scheme established for the team meetings specifically contemplated that the supervisors would "discuss and implement the solution" developed in the employee team meetings. This alone indicates that Respondent contemplated a system beyond merely an information gathering or providing exercise, or "brainstorming." And even though the such a clear-cut intent may not have been present when the January survey was initiated, it is obvious that employee sentiment played a significant role in the formulation of the 1992 health plan changes and that another employee survey prompted the placement of Respondent's pay evaluation system on the agenda for the first team meeting.

Taken together, I find that these events demonstrate a pattern through this period which served to undermine the Union's representative status by dealing directly with employees concerning matters which were appropriate subjects for bargaining. Concluding, as I have, that a pattern of conduct is evident, I reject Respondent's assertion that the team meeting issue is moot because the team meetings were discontinued for lack of interest. For these reasons, I find that these activities by Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

# CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive representative under Section 9(a) for the following appropriate collective-bargaining unit:
  - All asphalt drivers, field service drivers, oilers (fuelmen), and tiremen, at the Respondent's facility; excluding all office clerical employees, dispatchers, heavy equipment operators, helpers, mechanics, welders, combination mechanic-welders, mechanic helpers, asphalt laborers, general laborers, flag persons, guards and supervisors as defined in the Act.
- 3. By unilaterally implementing changes in its health care plan on April 1, 1992, and by bypassing the Union and dealing directly with unit employees between January and April 1992, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

# REMEDY

Having found that it engaged in certain unfair labor practices, Respondent will be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As 1992 health plan changes applied to all employees, and as Respondent was obviously at liberty to make changes applicable to unrepresented employees, ordering recission of the changes would be inappropriate. Accordingly, in order to dissipate the effects of the unfair labor practice found concerning those changes, Respondent will be required to make the unit employees whole for all losses resulting from the changes in benefits and contributions on April 1, 1992, until such time as the Union expressly agrees to those changes in the health plan, or a collective-bargaining agreement or an

impasse is reached in negotiations between the parties as provided in *Ogle Protection Service*, 183 NLRB 682 (1970), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, Respondent will be required to post the attached notice to employees in order to apprise them of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

## **ORDER**

The Respondent, Brannan Sand and Gravel Company, Denver, Colorado, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to bargain with International Brotherhood of Teamsters, Local 13, AFL–CIO as the exclusive collective-bargaining representative under Section 9(a) of the Act for the following appropriate unit of employees:
  - All asphalt drivers, field service drivers, oilers (fuelmen), and tiremen, at the Respondent's facility; excluding all office clerical employees, dispatchers, heavy equipment operators, helpers, mechanics, welders, combination mechanic-welders, mechanic helpers, asphalt laborers, general laborers, flag persons, guards and supervisors as defined in the Act.
- (b) Unilaterally changing its health plan benefits and employee contributions for health plan coverage insofar as such changes are applicable to employees in the above unit.
- (c) Bypassing International Brotherhood of Teamsters, Local 13, AFL-CIO as the representative of employees in the above unit and dealing directly with such employees about matters concerning their wages, hours, and other terms and conditions of employment.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 or the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Reimburse employees employed in the above unit in the manner specified in the remedy section of the administrative law judge's decision in Cases 27–CA–12223 and 27–CA–12223–2 for all losses they incurred by reason of Respondent's changes in its health plan benefits and employee contributions for health plan coverage on April 1, 1992.
- (b) Post at its Denver, Colorado facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on re-

<sup>&</sup>lt;sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. All pending motions inconsistent with this recommended Order are denied.

<sup>&</sup>lt;sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ceipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brother-hood of Teamsters, Local 13, AFL-CIO as the exclusive collective-bargaining representative under Section 9(a) of the Act for the following appropriate unit of employees:

All asphalt drivers, field service drivers, oilers (fuelmen), and tiremen, at the Respondent's facility; ex-

cluding all office clerical employees, dispatchers, heavy equipment operators, helpers, mechanics, welders, combination mechanic-welders, mechanic helpers, asphalt laborers, general laborers, flag persons, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change our health plan benefits and employee contributions for health plan coverage insofar as such changes are applicable to employees in the above unit

WE WILL NOT bypass International Brotherhood of Teamsters, Local 13, AFL-CIO as the representative of employees in the above unit and deal directly with such employees about matters concerning their wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 or the Act.

WE WILL reimburse employees employed in the above unit for the losses they incurred as a result of the April 1, 1992 changes in health benefits and employee contributions for health plan changes with interest.

BRANNAN SAND AND GRAVEL COMPANY